STATE OF MICHIGAN

COURT OF APPEALS

SUSAN KORRI,

Petitioner-Appellee,

v

NORWAY VULCAN AREA SCHOOLS,

Respondent-Appellant.

UNPUBLISHED
February 10, 2004

No. 238811
State Tenure Commission
LC No. 01-000006

Before: Neff, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Respondent appeals by leave granted from an order of the State Tenure Commission reinstating petitioner Susan Korri to her teaching position and ordering back pay. We affirm.

Petitioner attended Gogebic Community College, then transferred to Northern Michigan University where she obtained a degree with a major in physical education and a minor in business administration. After teaching in the Ewen-Trout Creek schools for three years where she received tenure, petitioner entered the military where she was a physical activity specialist. After receiving an honorable discharge, petitioner was a police officer in Texas for a year. The job as a police officer did not allow petitioner the flexibility to visit her parents in the Upper Peninsula. She went back to teaching in El Paso, Texas, where she was assigned to handle troubled youths because of her police background. When her father became ill, petitioner returned to Michigan and obtained a job with respondent, teaching developmental kindergarten through the twelfth grade.

During her first year of teaching for respondent, petitioner learned of a program called Exemplary Physical Education Curriculum (EPEC). Petitioner discussed with elementary school principal, Bertha Hommer, the possibility of starting the program. The issue was set aside until her second year of teaching, when Hommer authorized the purchase of materials, but there were no local workshops. Petitioner noted that the materials alone would help, but she was busy coaching basketball.

Hommer questioned petitioner about classroom supervision and injuries during class. Students had reported that petitioner would leave the classroom, and second graders were reporting injuries suffered during floor hockey to Hommer. Petitioner testified that she remained in the classroom, noting that she had no place else to go, and she did not have students reporting injuries to her. If a student was injured, petitioner allowed the student to sit out or sent them to

the nurse for an ice pack. She offered to have Hommer observe the floor hockey so she could see that students were required to keep their sticks on the ground to avoid injury. Petitioner was very concerned about injuries to students and denied referring to students as "lazy." Petitioner tried to attend an EPEC workshop because she did not feel comfortable observing the classroom activities of another teacher utilizing EPEC, stating that she did not want to adopt the "bad habits" of another teacher.

Petitioner was surprised when she saw her evaluation by Hommer. Andy Hongisto, the principal of the middle school, told her that the disagreement with Hommer was nothing to worry about, and he would handle her final observation. She was not aware of her final observation. Furthermore, she testified that she implemented EPEC into her lesson plans.

Hongisto testified that he was to conduct informal observations of petitioner, but the elementary school principal, Hommer, was to perform the official observations and evaluations. Hongisto did conduct one evaluation. "Right after" his observation, the administrative team, consisting of the three principals, advised petitioner that they would not be recommending tenure. He also testified that it was practice and policy of respondent to perform three evaluations.

Hommer testified that petitioner was hired to provide physical education classes to students in grades K-12. After the hire, petitioner expressed that she was not as comfortable teaching the early elementary students as the older students. They decided to look for programs to aid petitioner with the early elementary curriculum. Contrary to the testimony of petitioner, Hommer testified that she received a brochure from EPEC that was endorsed by the Michigan Counsel of Physical Fitness and the governor's fitness program and suggested the program. Petitioner seemed enthusiastic about trying the program, and the materials were ordered to address the K-2 grade teaching deficiency. The materials arrived in the mid to late September.

An individual development plan was completed with petitioner delineating her goals. Hommer set an additional goal that petitioner would differentiate physical education instruction according to grade level by using the EPEC program. Hommer also suggested that petitioner visit other physical education programs for K-2. Petitioner stated that there was no need.

Hommer observed petitioner on three occasions between September and October and conducted her first evaluation after November 3. Petitioner stated that she had no time to implement EPEC because she was busy as the varsity girls' coach. Hommer became concerned when the students began to express dissatisfaction with petitioner and wanted to participate in different activities. Other teachers, parents, and students, who complained of rough activities and lack of supervision, raised concerns. In response, petitioner stated that the students were lazy, and there was no need to observe physical education classes at another school because she did not "want to adopt other teacher's bad habits." When asked to divide lesson plans by grade, petitioner objected, stating that she should not have to do more work than other teachers. Petitioner allegedly told Hommer that she needed to look for a new teacher.

Petitioner's final evaluation occurred on January 23, 2001, after two observations in December and January. Hommer concluded that petitioner did not have a positive attitude, was not using EPEC, had no or deficient lessons plans, did not visit other schools, and only recently started to review the EPEC materials. Hommer concluded that petitioner had not made enough

efforts to continue working for respondent and discussed the matter with the superintendent. On March 12, 2001, respondent's school board concluded that petitioner's work as a probationary teacher was unsatisfactory, and her employment would be discontinued effective June 30, 2001.

The decision of the school board was appealed, and a hearing was held before an administrative law judge (ALJ), who ruled in favor of respondent. The ALJ concluded that the act only required one evaluation per year, "every year," and was not required to wait until April to issue a year-end evaluation. Moreover, even if respondent had waited until April to issue the evaluation, respondent could have deemed petitioner's performance unsatisfactory regardless of any improvement and the tenure commission was not entitled to examine the rationale. Having concluded that the procedural requirements were satisfied, petitioner's claim of appeal was denied.

The state tenure commission reversed the decision of the ALJ, concluding that MCL 38.83a(1) required a year-end evaluation, and respondent failed to comply. Moreover, MCL 38.83 provided that at least sixty days before the close of the "school year,"[1] the school board had to provide the probationary teacher with a definite written statement as to whether or not her work was satisfactory. Therefore, the commission concluded:

> We hold, therefore, that the annual year-end performance evaluation should occur within a reasonable time frame of the May 1 unsatisfactory notice deadline to be in compliance with the statute's year-end mandate. Recognizing that schools districts may have multiple probationary teachers to evaluate and limited administrative staff time to produce evaluations, it is to be expected that annual year-end performance evaluations will have to be completed a reasonable time in advance of the May 1 deadline. In this case, however, the January evaluation cannot be reasonably construed as complying with the statutory year-end requirement. On January 23, over three months remained before the May 1 notice deadline, and almost half of the district's school year remained. It is impossible to give effect to the Legislature's deliberate insertion of a "year-end" evaluation requirement and at the same time uphold a mid-year evaluation as satisfying that requirement. We find, therefore, that appellee failed to provide appellant the required year-end performance evaluation. …
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> In the instant case, we have found that appellant's January evaluation does not comply with the year-end evaluation mandated by § 3a(1). Pursuant to § 3a(2), such failure constitutes conclusive evidence that appellant's performance for the 2000-2001 school year was satisfactory. Because the 2000-01 school year was appellant's final year of probation, she acquired tenure with appellee by operation

[1] MCL 38.75 defines "school year" as "the legal school year at the time and place where service was rendered.

> of law. Accordingly, appellant's fourth exception and her petition to be reinstated, with back pay, must be granted.

Therefore, petitioner was ordered reinstated to her position, and this appeal followed.

The standard of review was set forth in *Ferrario v Escanaba Bd of Ed*, 426 Mich 353, 366-367; 395 NW2d 195 (1986):

> The Tenure Commission was established to act as a board of review for all appeals from the decision of a controlling board. The commission must make a de novo decision on all questions of fact and law. The Tenure Commission should review and consider the record made before the controlling board.
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> Either party may appeal a decision of the Tenure Commission. The function of the reviewing courts is to determine from the record whether there is competent, material, and substantial evidence on the whole to support the Tenure Commission's findings. This review entails a degree of qualitative and quantitative evaluation of the evidence considered by the agency. [Citations omitted.]

This case involves the application of MCL 38.83a addressing the time frame of performance evaluations for probationary teachers. It provides:

> (1) If a probationary teacher is employed by a school district for at least 1 full school year, the controlling board of the probationary teacher's employing school district shall ensure that the teacher is provided with an individualized development plan developed by appropriate administrative personnel in consultation with the individual teacher and that the teacher is provided with at least an annual year-end performance evaluation each year during the teacher's probationary period. The annual year-end performance evaluation shall be based on, but is not limited to, at least 2 classroom observations held at least 60 days apart, unless a shorter interval between the 2 classroom observations is mutually agreed upon by the teacher and the administration, and shall include at least an assessment of the teacher's progress in meeting the goals of his or her individualized development plan. This subsection does not prevent a collective bargaining agreement between the controlling board and the teacher's bargaining representative under Act No. 336 of the Public Acts of 1947, being sections 423.201 to 423.216 of the Michigan Compiled Laws, from providing for more performance evaluations or classroom observations in addition to those required under this subsection. Except as specifically stated in this subsection, this section does not require a particular method for conducting a performance evaluation or classroom observation or for providing an individualized development plan.
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> (2) Failure of a school district to comply with subsection (1) with respect to an individual teacher in a particular school year is conclusive evidence that the teacher's performance for that school year was satisfactory.

Issues of statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). This determination is accomplished by examining the plain language of the statute. *Id*. If the statutory language is unambiguous, appellate courts presume that the Legislature intended the meaning plainly expressed and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). Statutory language should be reasonably construed, keeping in mind the purpose of the statute. *Draprop Corp v Ann Arbor*, 247 Mich App 410, 415; 636 NW2d 787 (2001). When statutory terms are undefined, appellate courts may consider dictionary definitions to determine common usage. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 470; 521 NW2d 831 (1994). An administrative agency's interpretation of the act it is charged with administering is entitled to some deference for their expertise, particularly when there are gaps in the statutory scheme. *Tomiak v Hamtramck School District*, 426 Mich 678, 690; 397 NW2d 770 (1986).

Respondent contends that the evaluation prepared in January was sufficient to satisfy the "year end" requirements of MCL 38.83a(1). Moreover, the tenure commission may not analyze respondent's reason for concluding that work is unsatisfactory, *Lipka v Brown City Community Schools*, 403 Mich 554, 559-560; 271 NW2d 771 (1978), and the statute was not intended to remove the discretionary function from the school board. However, application of rules of statutory construction and the standard of appellate review precludes reversal of this case.

The statute does not define the term "year end". Random House Webster's College Dictionary (1997) defines "year end" as "the end of a calendar year" and "occurring at the year-end." Our Supreme Court has held that the school year ends on June 30. *Ajluni v Bd of Education*, 397 Mich 462, 465; 245 NW2d 49 (1976). Giving deference to the tenure commission's interpretation of the act, *Tomiak, supra*, there was competent, material, and substantial evidence on the whole record to support the findings and application of law that an evaluation in January may not serve as the year end evaluation for purposes of determining an employee's satisfactory performance. *Ferrario, supra*.

Respondent alleges that the statute was not designed to deprive schools of their discretionary action. However, the act's primary purpose is to protect teachers from school districts' arbitrary and capricious employment practices. *Davis v Harrison Community Schools Bd of Ed*, 126 Mich App 89, 95; 342 NW2d 528 (1983). Moreover, the statute at issue imposes mandatory duties upon the controlling board. The board "shall" ensure that a teacher has an individualized development plan, and the "year-end" evaluation "shall" be based upon at least two classroom observations held at least 60 days apart. The use of the term "shall" denotes mandatory, not discretionary action. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 59; 642 NW2d 663 (2002); *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982).[2]

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[2] We are mindful that the disposition of this case may be deemed to exalt form over substance. In the five months since goals were set for petitioner, respondent concluded that petitioner had taken no action to cure the deficiency with her performance that was allegedly harmful to the
(continued…)

Affirmed.

/s/ Janet T. Neff
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello

(…continued)

early elementary students. Arguably, the remedy for a failure to provide a year-end evaluation should merely be the examination of her performance for the remainder of the school year. However, the plain language of MCL 38.83a(2) provides that the failure to comply with subsection (1), regardless of whether the nature of the error is substantive or procedural, is to deem the performance satisfactory. *In re MCI, supra*. Thus, in this case, based on her prior tenure experience, petitioner received tenure. Courts may not legislate or read into legislation that which is not there. *Brandon Charter Twp v Tippett*, 241 Mich App 417, 422-423; 616 NW2d 243 (2000). Thus, respondent's request to retain discretionary action must be pursued before the Legislature.